No. 89-1327

MAR 19 1990
JOSEPH F. SAPNIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PEDRO RAMOS,

Petitioner,

v.

BETHLEHEM STEEL CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

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I. THE QUESTION PRESENTED

Did the court of appeals err in affirming the district court's grant of summary judgment in favor of the respondent on the ground that the evidence showed that petitioner could not raise any genuine issue of fact as to whether the reasons offered for petitioner's demotion were a pretext for national origin discrimination?

II. STATEMENT OF RESPONDENT BETHLEHEM STEEL CORPORATION AS REQUIRED BY SUPREME COURT RULE 29.1

Pursuant to Rule 29.1: All of the parties to this petition are listed in the caption. Bethlehem Steel Corporation has no parent. All of its subsidiaries are wholly owned except Hibbing Taconite Company, Ontario Iron Company, Rig VI Limited Partnership, and Bethlehem Singapore Private Limited.

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BRIEF OF RESPONDENT IN OPPOSITION

IV. STATEMENT OF THE CASE

This case involves a claim of national origin discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000 *et seq.* Petitioner, an Hispanic, was demoted from a position of maintenance foreman in the Coke Ovens division of the Bethlehem Plant in July, 1985, as part of a reduction in the salaried workforce. Because of the continuing financial problems of respondent Bethlehem Steel Corporation, in May, 1985, Joseph Lyford, Manager of Primary Operations at the Bethlehem Plant, directed John Mischisen, Coke Division Superintendent, to formulate reorganization plans which would reduce the salaried work force in his division. (Court of Appeals Appendix at 165a). Plaintiff

does not challenge the decision to reduce the salaried workforce and has stipulated that it was an economic necessity. (434a) Mischisen and his assistant, Charles Luthar, developed a reorganization plan which eliminated seven foreman positions in the Coke Division. (168a-169a) Four foremen elected to take a voluntary early retirement, leaving three to be selected for reduction on the basis of performance. (174a).

In making this determination, Mischisen and Luthar consulted with Benjamin Pinckney, who was then Supervisor of Maintenance; William Martin, who was to become Supervisor of Maintenance; M.J. Flaska, Supervisor of the Coal Chemicals section and Richard Guerra, Supervisor of the Ovens section. (52a-53a, 83a, 143a-144a, 174a-177a). Based on a review of the written performance evaluations of the employees (429a), and the recommendations from the supervisors, Mischisen and Luthar decided which salaried employees would be affected in each of the sections to be reduced. Pedro Ramos was demoted, having been identified as the least effective performer among the foremen in the maintenance section. (177a-178a) He returned to his position as craft welder in the Coke Ovens division, where he continues to be employed.

At the time of the reduction in force, Ramos' immediate supervisor was Kenneth Sutton, who in turn reported to Benjamin Pinckney. Mr. Pinckney, who is an African-American, testified that in the period from 1978 until 1983 Pedro Ramos reported directly to him. (39a) During that period he rated Ramos' performance variously as "good" and "very good". (40a). When Luthar asked him in 1985 to evaluate the performance of Pedro Ramos, Pinckney said it was "good," but that petitioner's mechanical ability was not as good as that of the other mechanical maintenance foreman. (45a-46a, 52a-53a).

Sutton, who was plaintiff's direct supervisor prior to the force reduction, testified that in May, 1984 he did the

last formal performance appraisal of plaintiff's work as a foreman, rating him as "good." (203a, 321a). All of the seven other maintenance foremen then working received higher overall ratings of "very good." (72a-74a, 200a-207a, 322a-324a).

William Martin, who had been selected to replace Pinckney as Maintenance Supervisor when Pinckney transferred to Central Maintenance, testified that he participated, with Luthar, Flaska and Guerra, in the process of ranking foremen in the Coke Ovens according to performance. Martin based his rankings on his personal knowledge of the ability of each employee. (120a-122a). He did not make the final decision about who would be removed as a foreman by the reduction in force, but he advised Mischisen and Luthar that he would rank Sutton and Ramos lowest in the maintainance section. (123a).

Martin testified that he had jokingly exchanged ethnic slang with other employees (but not with petitioner), but had never used such language in a malicious or derogatory way. (131a) Bethlehem's policy prohibits the use of such language and, when Luthar learned about Martin's testimony, he reprimanded Martin and sent a memorandum to all section supervisors reminding them that the use of such language is not permissible at Bethlehem Steel Corporation. (149a-150a, 208a, 484a-496a).

Both Mischisen, the Superintendent, and Luthar, his assistant, testified that they together, with input from those who reported to them, made the final decisions about the reduction-in-force which occurred in July, 1985. (83a, 84a, 178a) The demotion decisions were made by Mischisen and Luthar after reviewing performance appraisals and consulting with the other supervisors in the department, including Pinckney, who is African-American, Guerra, who is Hispanic, and Flaska. Because Martin was to become Maintenance Supervisor, they also asked his opinion about the rankings of the

foremen. In petitioner's unit, Ramos and Sutton, a Caucasian, were demoted. (319a, 373a)

V. SUMMARY OF ARGUMENT

There is no basis under Rule 10 of the Rules of the Supreme Court for this Court to exercise its discretion to review this case on writ of certiorari, where the decision of the court of appeals is not in conflict with any other court, and does not involve an important question of federal law which should be settled by this Court. This case involved merely an analysis of the evidence of record, both in discovery and at trial before federal arbitrators, as to whether there was sufficient evidence offered by petitioner to defeat a motion for summary judgment.

There is also no basis in the record to justify a review of the merits of the case. Respondent articulated job-related, non-discriminatory reasons for its demotion of petitioner. There is no dispute in the record as to any of the material facts, which facts did not raise any inference that the reasons articulated were a pretext for national origin discrimination.

VI. ARGUMENT

A. The Issues Raised by This Case Do Not Warrant Review by The Supreme Court

The question presented by this petition is not of sufficient importance to warrant review by this Court. Petitioner has not asserted that this case falls within any of the considerations set forth in Rule 10 of the Rules of the Supreme Court. Indeed, there is no basis for such an assertion were it to be made. The decisions below in this case present no conflict with the decisions of other federal or state courts, and are in all respects consistent with all other circuits and this Court in their analysis and conclusions. In essence, the decisions of the lower courts in this case turn upon the facts of the case alone and

review of the case by this Court will have little or no effect upon other litigants. As then Justice Rehnquist noted in *Ross v. Moffitt*, 417 U.S. 600, 616-617 (1974),

> "This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review."

There is no basis which should cause this Court to exercise its discretion to review the case. The only argument made by petitioner is that he is dissatisfied with the determinations by the lower courts that there are no disputed material facts in this case and that respondent is entitled to judgment in its favor as a matter of law.[1]

Federal Rule of Civil Procedure 56 requires summary judgment if there is no dispute of material fact and the moving party is entitled to judgment as a matter of law. It is true that the burden of proving entitlement to summary judgment is on the moving party, and a court must resolve any doubts as to the existence of disputed, material facts against the moving party and view all evidence in the light most favorable to the party opposing the motion. *Adickes v. Kress and Co.*, 398 U.S. 144, 158-59 (1970). Nonetheless, where the entire record could not "lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *Matsushita Elec. Industrial Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986).

In *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), the Court wrote:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, *after adequate time for discovery* and upon motion, against

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1. As petitioner's statement of the case acknowledges, the arbitrators hearing this case also found in favor of the respondent.

> the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the moving party's case necessarily renders all other facts immaterial. Id. at 322-23 (1986). (Emphasis supplied)

In this case, petitioner not only had adequate time for discovery, but had a three day trial on the merits before three arbitrators, and was able to cross examine all witnesses at length. Nonetheless he was unable to establish any evidence of pretext, as more fully discussed below.

In another decision, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986), this Court noted that the mere existence of some alleged factual dispute will not defeat an otherwise properly supported motion for summary judgment. Only a *genuine* issue of *material* fact will preclude the grant of summary judgment. *Anderson* defines a material fact as one which "might affect the outcome of the suit under the governing law . . ." *Id.* at 248. A "genuine" dispute of material fact exists only

> ". . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

The *Anderson* decision further states that

> ". . . the plaintiff must present *affirmative evidence* in order to defeat a properly supported motion for summary judgment."

Id. at 257 (Emphasis added.)

Therefore, a plaintiff may not defeat summary judgment by simply claiming, as here, that one of the persons, whose recommendation was sought, used ethnic slang in another context and to another person. This evidence is

insufficient for a reasonable fact finder to return a verdict for petitioner.[2]

Petitioner asks this Court to review his case because, in his view, the court of appeals misconstrued the facts; however, this Court has stated that it does not ". . . grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *See also Superintendent v. Hill*, 472 U.S. 445, 460-461 (1985) (dissenting opinion by Justice Stevens)

The facts relied upon by both courts below were undisputed and material, *i.e.*, there was an economic need to reduce the salaried workforce, two officials determined which supervisors would be demoted to the hourly ranks, and the decision was based on written performance evaluations (plaintiff ranked lower than his peers), and recommendations by superiors (all ranked plaintiff lowest). As more fully set forth below, there is no inconsistency in the evidence, and accordingly no basis to find that petitioner can raise a material issue of fact to establish that defendant's explanation is unworthy of credence.

Thus, this case does not present issues which warrant the exercise of discretionary review by this Court.

B. The Court Should Not Exercise Its Discretion to Review Because the Lower Courts Fully Considered And Correctly Decided the Issues

Another reason why this Court should decline review is that the district court properly granted summary judgment in favor of respondent, and the court of appeals properly affirmed this decision.

Petitioner asserts that there were five factual findings relied upon by the court of appeals which are "unsupported by the record." However, in his attempt

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2. This case was determined to be a non-jury case under Title VII to be decided by the Court.

to thus create a material issue of fact, petitioner cites parts of the record which, if read in context, do not put in issue the facts relied upon by the lower courts. They are not, under the *Anderson* standard, genuine issues of material fact upon which a reasonable fact finder could return a verdict for petitioner.

More specifically, petitioner first asserts that the court erred in finding that Martin had not made the decision. Petitioner relies on testimony by Luthar that he consulted Martin. Indeed, Luthar did consult Martin. But petitioner ignores the record evidence of both Mischisen and Luthar that although they consulted supervisors, the decision was made by them. Luthar testified that they looked at performance appraisals and considered the input from Guerra, Flaska, Martin, and Pinckney, but that he and Mischisen "had the ultimate decision." (450a) Luthar specifically testified that of the factors utilized by them, the "performance of the individuals was a key element" and by performance he said he meant the ratings in the performance appraisals. (450a).

Secondly, petitioner claims the court of appeals erred in its statement that the appraisal of Martin was consistent with the appraisal of Pinckney, a black. However, the evidence is clear that the appraisals were consistent. Luthar testified that as to petitioner's mechanical ability, Pinckney told him petitioner "was not up to par with the rest of the individuals, it was good but not as good." (441a). Pinckney confirmed that he so told Luthar. He was asked this question very specifically:

> Q. Mr. Pinckney, how does Mr. Ramos' mechanical abilities compare with the other mechanical abilities of the other maintenance foremen?
>
> A. I would rate him as good as opposed to very good in most cases with respect to the other mechanical foremen.

. . . .

> Q. "Okay, now did you tell Mr. Luthar that Mr. Ramos' mechanical abilities were not as good as the mechanical abilities of the other mechanical maintenance foremen?"
>
> A. I did

(266a-267a)

Pinckney then went on to testify that Luthar had asked him to compare petitioner's mechanical ability with the others and that was part of the conversation he had with Luthar (267a). Pinckney also testified that Ramos could not do the job of four of the other maintenance foremen in his unit (282a). Thus, it cannot be said that Pinckney was not consulted or that he gave petitioner a ranking that was inconsistent with Martin's ranking. In essence, they both told Luthar that petitioner was not as good as the other foremen in his mechanical abilities. It should also be noted that Sutton's written appraisal of Ramos was totally consistent with rankings of Ramos by both Martin and Pinckney.

Thirdly, petitioner asserts that the court of appeals' opinion was based on an erroneous finding that Martin only once used ethnic slang with another Hispanic. There is nothing in the decision that would in any way indicate that the number of times Martin used ethnic slang was a material issue. The material issue was whether Martin's use of ethnic slang could support an inference that Bethlehem decision makers acted for reasons of national origin. The court concluded that no such inference could be drawn.

Fourthly, petitioner asserts that the court of appeals believed petitioner had poor performance evaluations. The evidence is uncontradicted. Petitioner had a written appraisal of "good" by Sutton, his supervisor, whereas the other foremen in his unit had "very good,"

a higher rating. (451a) Pinckney concurred in the appraisal of petitioner, both on the written form and in his testimony. Nowhere was it ever asserted by respondent that petitioner's performance was rated as "poor," but only that petitioner had evaluations that were lower than those to whom he was compared. It is in this context that the Court reiterated the non-discriminatory business reason for the Ramos demotion.

And lastly, petitioner asserts that the court of appeals erroneously relied upon a finding that Martin "was *disciplined* for his one racial slur." (emphasis supplied) In fact, the court of appeals in its decision stated that the record disclosed that "Bethlehem *reprimanded* Martin for the remark." (emphasis supplied) And indeed, the evidence of record is that the company policy is against the use of such language and, when Luthar learned of it, he investigated the matter, reprimanded Martin and sent a memorandum to all section supervisors reminding them that the use of such language was not permissible (149a-150a, 208a, 484a-496a). Further, whether Martin was reprimanded as opposed to disciplined is hardly a genuine material issue of fact.

Petitioner's mischaracterizations notwithstanding, the record supports the district court's determination that respondent is entitled to judgment as a matter of law as petitioner did not demonstrate that there is reason to disbelieve the nondiscriminatory business justification offered for his demotion.

Petitioner argues that an employer cannot prevail on summary judgment in a race/national origin[3] discrimination case if the evidence shows that a "flagrant racist" made the disputed employment decision. This argument must fail because the evidence does not establish such facts. First, it is not true that the record shows that

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3. In the lower courts, petitioner alleged only a claim for national origin discrimination. To the extent he now asserts race discrimination, that issue has been waived.

William Martin was a "flagrant racist." More importantly, as discussed above, it does not show that he was the one who decided to demote petitioner.

The evidence establishes that Mr. Martin was only one of four supervisors in the Coke Ovens who made recommendations to Messrs. Mischisen and Luthar about which salaried employees should be demoted as part of the reduction in the workforce. Mr. Martin was not the decisionmaker in this case; he offered his opinion to the decisionmakers, Mischisen and Luthar, that petitioner was the least capable of the maintenance foremen. Mr. Pinckney, petitioner's African-American supervisor, concurred in the evaluation of petitioner's mechanical skills.

William Martin testified that he had jokingly *exchanged* ethnic slang with a Hispanic named Nelson Matos. He emphatically denied using ethnic or racial slang in a derogatory or malicious manner. Petitioner did not produce Mr. Matos or any other witness or evidence to contradict Martin's testimony that he had used such language only in well-understood jest. Indeed, petitioner did not testify that he had ever heard Martin use ethnic slang.

The complaint in this case does not allege a violation of Title VII for national origin harassment or for a "hostile work environment;" therefore, the evidence concerning Mr. Martin's use of ethnic slang is presumably offered as anecdotal evidence of respondent's discriminatory intent in demoting petitioner. Given the facts of this case, however, this evidence is not sufficient to allow petitioner to carry his ultimate burden of proof to show that respondent's explanation for petitioner's demotion is pretextual.

In *Barber v. International Broth. of Boilermakers*, 778 F.2d 750, 761 (11th Cir. 1985), the court wrote that ". . . the mere utterance of an ethnic or racial epithet is insufficient to carry the ultimate burden of proof [in a

Title VII race discrimination case]." Similarly, in *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438 (9th Cir. 1990), the court of appeals affirmed summary judgment in an age discrimination case, finding that evidence that the decision maker had said that he promoted a younger employee because he was "a bright, intelligent, knowledgeable young man" was not enough to carry plaintiff's burden on his claim of discriminatory failure to promote. *See also Walker v. St. Anthony's Medical Center*, 881 F.2d 554, 559-560, n. 6 (8th Cir. 1989) (a sexist comment is not sufficient to demonstrate that plaintiff's gender was a determining factor in the decision to discharge her).

Because the petitioner failed to produce evidence establishing that respondent's explanation for his demotion was pretextual, the grant of summary judgment was proper in this case. As this Court observed in *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986), summary judgment is appropriate against ". . . the party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and which that party will bear the burden of proof at trial."

Petitioner mistakenly likens his case to *Price Waterhouse v. Hopkins*, ____ *U.S.* ____ , 109 S.Ct. 1775 (1989). The instant case is not a "mixed motive" employment discrimination case since it is not ". . . a case *admittedly* involving both [legitimate and discriminatory] kinds of considerations." Id. at 1789. (emphasis added) In the Price Waterhouse case, the evidence established that the decision to deny partnership to plaintiff was based in part on several partners' comments that resulted from sex stereotyping. For example, the partner who told Ms. Hopkins of the company's decision to place her candidacy for partnership on hold advised she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Id. at 1782.

By contrast, in this case, there is not any evidence that at the time they demoted plaintiff Messrs. Mischisen and Luthar knew anything about Mr. Martin's use of ethnic slang. Certainly, there is not any evidence that national origin stereotyping played any part in the several evaluations of petitioner's skills or the final decision to demote him. Accordingly, the *Price Waterhouse* decision is not relevant to the analysis of this case.

VII. CONCLUSION

Petitioner had ample opportunity during discovery and at the three days of the arbitration hearing to develop any genuine issue of material fact upon which a jury or fact finder could reasonably find for petitioner. That he has not done so is established by an analysis of the record which clearly supports the decisions of the district court as well as the Court of Appeals for the Third Circuit.

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

March 19, 1990
DATED

/s/ Dona S. Kahn

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